No. 10629.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CLARENCE O. FLANNAGAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

Jurisdictional Statement.

The United States District Court for the Southern District of California had jurisdiction of appellant and the subject matter and this Court has jurisdiction of the appeal.

A. The offense charged was a violation, within the Southern District of California, of The Emergency Price Control Act of 1942, Pub. L. 421, 77th Cong. 2nd Sess., 56 Stat. 23, January 30, 1942 (50 U. S. C. App. 901-942) by violating Revised Maximum Price Regulation 169 (7 Fed. Reg. 10381) as amended. Under the provisions of said Act, said Court had jurisdiction to try the case.

B. This Court has jurisdiction of the appeal under the provisions of Section 225(a) and (d) of Title 28, United States Code.

Statement of the Case.

By leave of Court an Amended Information was filed herein on October 11, 1943 [R. p. 22]. Trial was had and defendant was convicted by a jury on November 11, 1943 [R. p. 69]. The conviction was as to Count Ten which appears at page 32 of the transcript. On November 30, 1943, defendant was sentenced to serve six months in jail and pay a fine of $1,000, execution of the term of imprisonment was suspended for one year and defendant placed on probation for that period of time. The fine was deposited in the registry and on December 4, 1943 defendant appealed. Although based upon several assignments of error, appellant's first point is in substance that the allegations of Count X of the Amended Information do not state facts sufficient to constitute a criminal offense. His second point in substance is that the trial court erred in allowing the witness Kilduff to examine Government's Exhibit No. 6 for the purpose of refreshing his memory. His third point is that the jury was improperly instructed on specific intent. These points will be dealt with in the order presented by appellant.

Questions Involved in Appeal.

The legal issues involved in the appeal are as follows:

1. Does the information state a criminal offense?
2. May a witness, for the purpose of memory refreshment, while on the witness stand, consult a memorandum made by another person and subscribed by the witness?
3. Did the court sufficiently instruct the jury on the quality and type of intent involved in the offense charged?

Summary of the Evidence.

The summary of the evidence set forth in appellant's opening brief is an approximately accurate digest of the matters there printed and for that reason it is not appropriate to repeat. However, certain evidence introduced at the trial has been omitted from appellant's summary or incompletely stated and appellee therefore submits the following additional summary of evidence.

I.

Use of Government's Exhibit No. 6, for Identification, to Refresh the Memory of the Witness Kilduff and the Evidence Given Following Reference to the Exhibit.

[R. p. 155.] Kilduff testified that he had a conversation with some one from the Office of Price Administration on or about June 28, 1943. He was then shown a two page memorandum which was marked Government's Exhibit No. 6, for identification [R. pp. 157 and 158] and the following question was propounded. " 'Will you look that over and see if it refreshes your memory on any subject I have asked you about here this morning?' " He answered, " 'Yes.' " [R. p. 159].

> "Q. 'Is your memory now refreshed, Mr. Kilduff, as to the amount you paid to Mr. Flannagan in addition to the check that you gave him on the 25th day of June of 1943?' A. 'Well, just what it says there.'
>
> Q. 'Tell us.'
>
> Mr. Katz: 'Just a moment, if the Court please. I will object to what it says on the paper.'
>
> The Court: 'Yes, that will go out gentlemen. You disregard it.'

Q. By Mr. Tolin: 'Tell us how much you paid him over and above the amount of the check that you gave him on the 25th of June.'

Mr. Katz: 'Objected to, if the Court please; incompetent, irrelevant and immaterial. It has already been asked and answered.'

The Court: 'Overruled.'

Mr. Katz: 'Exception noted.'

The Witness: '$39.48.'

Q. By Mr. Tolin: 'Is your memory now refreshed, Mr. Kilduff, as to the amount you paid him on the 28th day of June, 1943, over and above the amount of the check?' A. 'It is on there. $29.75.'

Mr. Katz: 'Just a minute, if the Court please. I will move to strike for the purpose of the objection.'

The Court: 'That may go out. Disregard it, gentlemen.'

Q. By Mr. Tolin: 'Mr. Kilduff, is your memory now refreshed as to the amount that you paid over and above the amount of the check on the 28th of June, 1943? Please tell us yes or no.' A. 'Yes.'

Q. 'What amount did you pay over and above the amount of the check on that date; that is to say, on the 28th day of June, 1943?' A. '$29.75.'

Q. 'What is this that I have shown you here, Exhibit 6, for identification?' A. 'The statement that I gave on that day.'

Q. 'To whom?'

Mr. Katz: 'Objected to, if the Court please; incompetent, irrelevant and immaterial. The statement is hearsay.'

The Court: 'Sustained.'

Q. By Mr. Tolin: 'What was the date on which you gave this statement?' A. '28th of June.'

On cross-examination the following occurred [Tr. of R. p. 163]:

"* * * 'I paid for that shipment of June 25 by the check which is marked as Government's Exhibit No. 3. When Mr. Flannagan presented me with the invoice I wrote out the check for the amount shown on the invoice and handed it to Mr. Flannagan. At that time I handed Mr. Flannagan the other consideration but I don't recall the amount; I can't recall the amount that long ago. I don't know whether the additional amount was for any particular item on the invoice. I don't know what it was for.' * * *" [Tr. of R. pp. 164 and 165.]

"Q. 'Now, Mr. Kilduff, you were shown a statement to refresh your recollection, and then made certain statements after having read it. Isn't it true that your testimony with reference to the amounts that you then gave were given entirely from the memorandum, that you had no recollection of those amounts?' A. 'The only recollection I have is how much a pound it was. I don't have how much it figured out. I have the round figure in my mind of how much a pound it was on the beef.'

Q. 'And even after reading this statement you do not at this time know what the amounts were that you state that you gave Mr. Flannagan?' A. 'Well, there was two of them there, and I don't remember just what they were, no, sir.'

Q. 'You still don't remember?' A. 'No, sir.'

Q. 'And the statement that Mr. Tolin showed you did not refresh your recollection as to what

those amounts were?' A. 'Well, they did when I read it. But I can't remember them right now. I remember the 7 cents.'

Q. 'When you read it, Mr. Kilduff, you merely read the figures shown on the statement, is that right?' A. 'That's right.' "

Prior to being shown Government's Exhibit No. 6, for identification, the witness had testified concerning the amount of the overcharges as follows [Tr. of R. p. 142]:

" 'He (appellant) said that he heard I wanted some meat and said he could supply me a little but probably not all I needed and said there was an overage. He did not tell what it was for.' "

It was at that time that the invoice, Government's Exhibit No. 1, for identification, was given Kilduff. He testified about it as follows:

" 'I received the meat that is listed on the invoice. I paid Mr. Flannagan the price that appears on that invoice. There wasn't much anything said, only he told me how much other in cash I owed, that was for him. I don't remember how much I gave him on that invoice but it figured out about 7¢ a pound on the beef.' "

[Tr. of R. p. 146.] Concerning the June 25, 1943, transaction the witness testified:

" 'After I wrote the check, Government's Exhibit No. 3, for identification, I gave it to Mr. Flannagan. As to whether I gave him anything else at that time

my answer is that I gave him some money. There was nothing said by him or by me as to the sum that I gave him at that time. I gave him Government's Exhibit No. 3, for identification. He did not do any calculating in my presence; the way I determined how much money to give him other than the amount that appears on the check was that he told me how much. I do not remember the amount of money nor the approximate amount of money. I don't remember how it figured out in money.' * * *."

On cross-examination the witness testified [Tr. of R. pp. 162 and 163]:

"* * * 'We did not discuss the individual prices of the items listed on the invoice. I paid the invoice of June 24, Government's Exhibit No. 1. As to whether the check was for the sum of $138.25, my answer is that it was. That is the amount that is the total of the items, that is shown on the invoice of June 24. At the time Mr. Flannagan received the check he marked the invoice paid and handed it back to me. As to whether I recall in addition to giving Mr. Flannagan the check whether I gave him any cash or other consideration, my answer is yes. I recall it from my own recollection and memory. I don't know how much it was. I have no way of knowing what it was, except my recollection.' * * *."

II.
Evidence Re Counts 8 and 9.

[R. pp. 166 and 168.] Roland H. Richards testified that he operated a retail meat market in Anaheim, California, during June and July, 1943, that he had a conversation with appellant at the witness' market in which the appellant said:

> " 'I understand you are short of beef.' I said, 'Am I short of beef? I sure am. I just can't get any meats at all. I sure would like to satisfy these people here. I have been in business here a long time, and anything you can do for me I sure would appreciate it.' He said, 'Well, I can let you have meat, but it is going to cost you a little overage.' I said, 'What do you mean by that, Mr. Flannagan?' He said, 'Well, I will have to select your beef and I will have to truck it down here for you and, of course, that is going to cost some overage.' I didn't ask him the amount or anything like that. I said 'O. K.' 'I will be glad to have the beef.' "

The witness wasn't present when the meat was delivered and did not recall whether he ever paid appellant any excess money for the first meat that was delivered pursuant to the conversation. The next week appellant again came to the witness' market, made a delivery and presented an invoice which the witness paid. The witness stated he paid appellant some overcharge down through the first time they dealt.

[R. p. 183.] Louis M. Pickel testified that appellant had been one of his regular suppliers of meat for seven years and that Pickel operated a retail meat market at Anaheim, California. Sometime prior to the first of July, 1943, at Mr. Pickel's market appellant told him that

meat was getting hard to get and under the circumstances it would cost more and that Pickel would have to pay more for it. He told Pickel how much more, but Pickel could not remember the amount but recalled that he told appellant that he guessed it was the only way out and he guessed it would have to be all right. On the first of July, 1943, appellant delivered some meat to Pickel's market at which time he also gave Pickel an invoice, Government's Exhibit No. 7 [R. p. 188]. At the same time he gave him a piece of paper and told him that the amount thereon was what was owed appellant. To the best of Pickel's recollection he did not then owe appellant for any meat other than the meat described on the invoice, Government's Exhibit No. 7. Said slip of paper, Government's Exhibit No. 8, for identification, was what appellant gave the witness for collection that day. It was what he was collecting for meat on the invoice, Government's Exhibit No. 7, appellant wrote the figures on Government's Exhibit No. 8, for identification, which are in pencil. When Government's Exhibit No. 8, for identification, was handed to witness by appellant, Pickel paid appellant $52.77 [R. p. 186], at which time appellant said to Pickel, " 'That is how much you owe me today ' " Pickel paid $52.77. Appellant accepted it and wrote " 'Paid $38.93' " on the invoice, Government's Exhibit No. 8.

The Court ruled that Government's Exhibit No. 8, for identification, should not be handed to the jury, but that the part of it which was written in pencil could be read to the jury. The portion in pencil was read as follows: " '5 2 7 7.' "

ARGUMENT.

I.

The Court Did Not Err in Overruling the Demurrer and in Denying a Directed Verdict.

Appellant's Point I as argued in his brief is limited to two challenges to the sufficiency of the Amended Information which is claimed to be insufficient because it fails to allege:

(1) The status of appellant—that is, the particular type of seller appellant was at the time of the alleged sale; and

(2) The manner in which the alleged ceiling price was arrived at by the Government. (In his brief at page 16 appellant refers to the ceiling price as 27¼¢ per pound. Elsewhere in the record, and brief the ceiling price is always mentioned as 22¼¢ per pound.)

This argument is specious because the offense charged is one which any person may commit. It is complained that appellant could not tell from the information whether he was a "wholesaler," "peddler truck seller," "independent wholesaler," "hotel supply house," "slaughter" or "packer."

As no one was permitted by law to sell a beef carcass or side at 29¼¢ per pound, the particular classification in business of defendant could not be an element of the crime, nor could the Government have pleaded itself out of a case by undertaking to catalogue the appellant within any of the several classifications defined in the regulation.

Likewise, as there is no formula by which the price of a Grade A beef carcass or side could be computed to be

29¼¢ per pound, the manner in which the Government arrived at a particular computation of the ceiling price is not material for the highest price computable under the regulation was less than 29¼¢ per pound.

This theory of pleading has been approved in *United States v. Charney,* 50 F. Supp. 581 (Dist. Ct. Mass. 1942), which concerned a prosecution for violation of the same regulation involved in this case.

See, also:

Taylor v. United States, 142 Fed. (2d) 808 (9th Circuit, April 26, 1944).

The opinion in *Cohen v. United States,* 294 Fed. 488, contains apt language on the sufficiency of a criminal pleading.

> "The sufficiency of the indictment, especially after conviction, is no longer tested by the nicety of expression once required. If by fair and reasonable construction, it alleges every essential element to make out the crime, it is sufficient."

The case of *Burton v. United States,* 202 U. S. 344, 60 L. Ed. 1057, also states the rule.

> "The averments of the indictment were sufficient to enable the defendant to prepare his defense, and in the event of acquittal or conviction the judgment could have been pleaded in bar of a second prosecution for the same offense. The accused was not entitled to more, nor could he demand that the special or particular means employed in the commission of the offense should be more fully set out in the indictment. The words of the indictment directly and without ambiguity disclosed all the elements essential to the commission of the offense charged, and, therefore,

> within the meaning of the Constitution and according to the rules of pleading, the defendant was informed of the nature and cause of the accusation against him."

There is no substance in appellant's claim of bewilderment at the information for he was able to and did testify in his defense that the ceiling price was as the Government had pleaded it to be; and placed his hope of acquittal on the claim that he had charged only that price, and not the price of 29¼¢ per pound which the Amended Information accused him of receiving. The case turned, not on the classification of appellant as a "peddler truck seller" but on the conflicting testimony as to whether he had invoiced at a price pleaded as the ceiling price, and clandestinely collected a price that, for Grade A beef in the form he sold it, was above the ceiling for all classes of purveyors of a Grade A beef carcass or half.

The testimony of appellant on this subject is as follows [R. p. 201]:

> "To the best of my knowledge the prices on Government's Exhibit No. 1 were the ceiling price the West Coast Meat Company was allowed to charge for that day. It is true that the other invoices that have been shown here this morning are the ceiling price, including the extra because of the zone and the delivery charge."

The Amended Information performed its function of notifying the appellant of the nature of the charge. He was told that the price which at the trial he was willing to admit as his ostensible price was not disputed. The price mentioned in the pleading which was the important one to plead was the price at which the sale was alleged

to have been made, for it was the charging of that price which was an element of the offense, and if that price was charged, regardless of the classification of the vendor, then there was a sale at a higher price than permitted for no person was allowed to charge such a price. The language of prohibition in the regulation involved reads as follows (Revised Maximum Price Regulation 169, Section 1364.401):

> "* * * no person shall sell or deliver any beef carcass or beef wholesale cut, and no person shall buy or receive any beef carcass or beef wholesale cut at a price higher than the maximum price permitted by 1394.451; and no person shall agree, offer, solicit or attempt to do any of the foregoing."

II.

There Was No Error in Allowing the Witness Kilduff to Examine Government's Exhibit No. 6, for Identification, for the Purpose of Refreshing His Memory.

The attack on the use of the memorandum [Government's Exhibit No. 6, for identification, R. p. 156] is based upon objections to the admission of testimony. There was no motion to strike the testimony, except certain motions to strike portions thereof, which motions were granted. There was no objection to the use of the document for memory refreshment. The first objection is set forth on page 155 of the transcript of record.

> "Q. By Mr. Tolin: 'Mr. Kilduff, I am showing you now a two-page memorandum of some sort written in ink on yellow paper. Will you look that over and see if it refreshes your memory on any subject that I have asked you about here this morning?'

Mr. Katz: 'If the Court please, I am going to object to that as incompetent, irrelevant and immaterial; that counsel cannot impeach his own witness. This witness is a Government's witness. It is leading and suggestive. I know that it is proper, if the Court please, for a witness to refresh his memory if he cannot recall an independent fact; but to utilize this method of impeaching—and that is what it amounts to—one's own witness, I think it is improper, and I make my motion on that ground, if the Court please.'

Mr. Tolin: 'Let me say the purpose is not impeachment, but to refresh his memory.' "

In answer to a question propounded as to whether his memory was refreshed as to the amount he paid to appellant in addition to the check given on the 25th day of June, 1943, the witness gave an ambiguous answer [R. p. 159]: " 'Well, just what it says there.' " It is impossible to tell from the answer whether the witness was stating that his memory was refreshed or whether he then relied upon the document. The Court struck the answer, although the answer did not state the amount of money paid. The witness had immediately before stated that his memory was refreshed by reference to the document [R. p. 159]: " 'Well, just what it says there.' " He was then asked [R. p. 160]:

"Q. By Mr. Tolin: 'Tell us how much you paid him over and above the amount of the check that you gave him on the 25th of June.'

Mr. Katz: 'Objected to, if the Court please; incompetent, irrelevant and immaterial. It has already been asked and answered.'

The Court: 'Overruled.'

Mr. Katz: 'Exception noted.'

A. '$39.48.'

Q. By Mr. Tolin: 'Is your memory now refreshed, Mr. Kilduff, as to the amount you paid him on the 28th day of June, 1943, over and above the amount of the check?' A. 'It is on there. $29.75.'

Mr. Katz: 'Just a minute, if the Court please. I will move to strike for the purpose of the objection.'

The Court: 'That may go out. Disregard it, gentlemen.'

Q. By Mr. Tolin: 'Mr. Kilduff, is your memory now refreshed as to the amount that you paid over and above the amount of the check on the 28th of June, 1943? Please tell us yes or no.' A. 'Yes.'

Q. 'What amount did you pay over and above the amount of the check on that date; that is to say, on the 28th day of June, 1943?' A. '$29.75.'

Q. 'What is this that I have shown you here, Exhibit 6, for identification?' A. 'The statement that I gave on that day.'

Q. 'To whom?'

Mr. Katz: 'Objected to, if the Court please; incompetent, irrelevant and immaterial. The statement is hearsay.'

The Court: 'Sustained.'

Q. By Mr. Tolin: 'What was the date on which you gave this statement?' A. '28th of June.' "

The Court had before it at the time it admitted the testimony of the witness after reference to the document the following direct statement of the witness that his memory was presently refreshed so that the Court properly concluded that the witness was not testifying from a past recollection recorded but from a present recollection revived. " 'Will you look that over and see if it refreshes

your memory on any subject I have asked you about here this morning?'" [R. p. 155.] Answer: "'Yes.'"

> "Q. By Mr. Tolin: 'Tell us how much you paid him over and above the amount of the check that you gave him on the 25th of June' * * * A. '$39.48' * * *
>
> Q. By Mr Tolin: 'Mr. Kilduff, is your memory now refreshed as to the amount you paid over and above the amount of the check on the 28th of June, 1943? Please tell us yes or no.' A. 'Yes.'
>
> Q. 'What amount did you pay over and above the amount of the check on that date; that is to say, on the 28th of June, 1943?' A. '$29.75.'" [R. p. 160.]

It is then related that Government's Exhibit No. 6, for identification, which the witness had before him was a statement which he gave on June 28, 1943.

It might be argued that the requirements were met for using the document as a record of past recollection recorded, however, its use was clearly limited to stimulating a present recollection revived. There was no objection made other than the general objection that the questions were incompetent, irrelevant and immaterial and that the question had already been asked and answered. There was no objection to the witness having access to the document.

If the foundation for use of the document on the basis of its being a record of past recollection was inadequate there was nothing in the objections to direct the Court or counsel's attention to the inadequacy of the foundation so that it could be strengthened. As to the document's use to stimulate a present recollection, all of the tests of the authorities have clearly been met.

Wigmore on Evidence, Third Edition, Sec. 758.

"The purpose being to allow the legitimate use of written aids, while preventing their misuse, it would seem that no hard-and-fast rules can be laid down for invariable application. That which is suspicious and reprehensible in one instance may be entirely trustworthy in the next. No unerring markers of impropriety can be named absolutely.

"It follows, therefore, that any writing whatever is eligible for use, while, on the other hand, any writing whatever may, in the circumstances, become improper. This has been well put in the following passage:

"1835. Sir G. A. Lewin, Note to Lawes v. Reed, 2 Lew. Cr. C. 152: 'Where the object is to revive in the mind of the witness the recollection of the facts of which he once had knowledge, it is difficult to understand why any means should be excepted to whereby that object may be obtained. Whether in any particular case the witness' memory has been refreshed by the document referred to, or he speaks from what the document tells him, is a question of fact open to observation, more or less according to the circumstances. If in truth the memory has been refreshed, and he is unable in consequence to speak to facts with which he was once familiar, but which afterwards escaped him it cannot signify, in effect, in what manner or by what means these facts were recalled to his recollection. Common experience tells every man that a very slight circumstance, and one not in point to the existing inquiry, will sometimes revive the history of a transaction made up of many circumstances . . . Why, then, if a man may refresh his memory by such means out of court, should he be precluded from doing so when he is under examination in court?'

"It is worth while, therefore, to note that none of the limiting rules just examined for past recorded recollection have any bearing on the present subject. * * *"

Jewett v. United States, 15 F. (2d) 955, 956 (C. C. A. 9th, 1926).

"It is one thing to awaken a slumbering recollection, of an event, but quite another to use a memorandum of a recollection, fresh when it was correctly recorded, but presently beyond the power of the witness so to restore that it will exist apart from the record. In the former case it is quite immaterial by what means the memory is quickened; it may be a song, or a face, or a newspaper item, or a writing of some character. It is sufficient that by some mental operation, however mysterious, the memory is stimulated to recall the event, for when so set in motion it functions quite independently of the actuating cause."

To the same effect are the following cases:

McHenry v. United States, 276 Fed. 761;

Delaney v. United States, 77 Fed. (2d) 916;

Prentiss v. Chandler, 85 Fed. (2d) 733 (C. C. A. 9th, 1936).

Appellant in his brief reaches into matters developed in cross-examination in an effort to show that the memory of the witness was not revived. If this was a point at all it was one relating to weight rather than admissibility

of evidence and was for the jury. The point is also met by a consideration of the record. The matters developed on cross-examination were not before the Court when the witness had access to the document and gave the evidence complained of. At the time the witness gave his testimony he claimed to be doing so from a refreshed memory. Even his answer which was stricken, " 'Well, just what it says there' " is but a claim that the memorandum and the witness' memory coincided. No motion to strike was made when the alleged deficiencies were developed on cross-examination. There was no ground for such an attack for all of the answers given by Kilduff on cross-examination which are relied upon by appellant as showing that his recollection was not refreshed are substantially modified by the following quotation from the Record, page 165:

> "Q. 'You still don't remember?' A. 'No, sir.'
>
> Q. 'And the statement that Mr. Tolin showed you did not refresh your recollection as to what those amounts were?' A. 'Well, they did when I read it. But I can't remember them right now. I remember the 7 cents.' "

The testimony by the witness after refreshing his memory by reading the memorandum was a mere summary of what he had already positively stated without aid of a memory refresher.

It was his recollection before he was shown Government's Exhibit No. 6, for identification, that the over-

charge on the beef was at about 7¢ per pound [R. pp. 142 and 143]. "* * * 'There wasn't much of anything said, only he told me how much other in cash I owed, that was for him. I don't remember how much I gave him on that invoice but it figured out about 7¢ a pound on the beef.'"

The extent to which the witness' memory was refreshed and the only way in which his testimony was amplified after he had recourse to Government's Exhibit No. 6, for identification, was to state that the amount of overcharge that he paid was $39.48 as to the invoice involved in Count X upon which he was convicted, and $29.75 in the invoice involved in the June 28th transaction [Count XI, R. p. 106].

Government's Exhibit No. 2 [R. p. 150], is the invoice involved in Count X. It shows one-half (½) Str. 564 pounds at 22¼ cents per pound. The weight, 564 multiplied by seven cents equals $39.48. The same formula applied to the June 28th invoice shows that seven cents a pound added to the price involved equals $29.75.

The overcharge as pleaded, was proved by this testimony before the witness was shown the memorandum for purposes of memory refreshment. All that was accomplished by use of the memorandum could have been done equally well by the jury by a simple exercise in multiplication, based upon testimony already in the record.

III.

Instruction No. 14 Was Not Unfair to Appellant.

In giving Plaintiff's Instruction No. 14 the Court prescribed a rule more favorable to defendant than the law required.

The offense charged is not one requiring a specific intent. There is nothing in the Emergency Price Control Act of 1942 which provides that an act must be done with any specific intent in order to constitute an offense. Section 205(b) of the Act reads:

> "Any person who willfully violates any provision of section 4 of this Act, and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202, shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years, in the case of a violation of section 4(c) and for not more than one year in all other cases, or to both such fine and imprisonment. * * *"

"Willfully" is discussed in *St. Joseph Stockyards Co. v. United States,* 187 Fed. 104 (C. C. A. 8th, 1911):

> "* * * * 'Willfully' means purposely or obstinately, and is designed to describe the attitude of a carrier, who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements. * * *"

From a reading of the Instruction complained of it appears that the Court did actually instruct the jury that it was necessary in order to convict for them to believe that defendant intended to sell meat at a higher price than permitted by the Maximum Price Regulations promul-

gated under the Emergency Price Control Act of 1942. The Instruction is as follows, the italicized portion being that complained of [R. pp. 225 and 226]:

> "This is an offense requiring a specific intent, and such intent must be shown to exist beyond a reasonable doubt. The intent on the part of the defendant may be shown by his acts and declarations and by the circumstances surrounding his actions which, when taken together, must prove beyond a reasonable doubt that the defendant had the specific intent to wilfully sell and deliver meat at a price or prices in excess of the lawful price or prices.
>
> *"If you are convinced beyond a reasonable doubt that the defendant did in fact sell meat to anyone, or more of the persons named in the several counts of the Information, and that he did in fact charge a price or prices for such meat in excess of the prices I have read to you, and that he at such time or times intended to so sell such meat at a higher price or prices than permitted by the Maximum Price Regulations promulgated under the Emergency Price Control Act of 1942, then you will find that he did so with a specific intent."*

It cannot be determined from the alleged exception taken at the trial just how appellant wanted the Instruction revised.

With some modification the Court gave defendant's Proposed Instruction No. 13 as follows [R. p. 225]:

> "It is neither criminal nor unlawful for a person to do, or to agree to do, that which the law does not prohibit but recognizes may be lawfully done. So if you believe from the evidence in this case, or if you entertain a reasonable doubt from all the evidence that whatever act or acts was or were done by the

> defendant was or were done, not with any criminal intent or not for the purpose of doing or performing any unlawful act, but, on the other hand, was or were done honestly and with an honest intent and purpose and in the belief that such act or acts was or were proper and lawful, then and in such event no crime had been committed, and if you so conclude under all of the evidence it will be your duty to find the defendant not guilty."

To this Instruction the Court added [R. pp. 226 and 227]:

> "If you find from the evidence that the defendant did not violate any of the provisions of revised maximum price regulations as alleged in the respective counts of the amended information, or if after considering all of the evidenec in the case and the law as stated in the instructions of the court, there is a reasonable doubt in your mind as to whether or not the defendant intentionally violated any of the provisions of an applicable revised maximum price regulation as alleged in the amended information and as stated in the instructions of the court, you must find the defendant not guilty."

In view of the fact that the statute in defining the crime makes "willfulness" an element, but does not add any other requirement of motive or state of mind, it appears that the Court fulfilled its duty by its treatment of willfulness in Plaintiff's Instruction No. 14 [R. p. 225]; Defendant's Instruction No. 13 [R. p. 225] and the Court's own instruction above quoted. The latter instruction added the word "intentionally" to the Government's burden of proof. A similar instruction was approved in *Zimberg v. United States,* 142 F. (2d) 132 (1st Circuit, April 24, 1944).

Appellant's Authority Distinguished.

Appellant relies upon *United States v. Johnson*, 53 Fed. Supp. 167 (Dist. Ct. of Del. 1943). Without conceding the correctness of the decision in that case, it is deemed appropriate to point out that the case is distinguishable from the present case. This case involves Revised Maximum Price Regulation 169, which concerns beef. The Regulation in *United States v. Johnson* was Regulation 269. It is necessary to go beyond the Regulation to determine the maximum price at which any of the vendors governed by the Regulation can sell poultry. The opinion includes the following:

> "It is manifest from this regulation that to determine ceiling price in a given situation, one must know (a) the buyer's 'customary receiving point'; (b) the freight charges from Chicago to the buyer's 'customary receiving point'; (c) whether the prosecution is for an alleged violation of the retail ceiling or of the wholesale ceiling; and (d) with respect to those transactions alleged to have been 'f. o. b.', the freight charges from the farm to the buyers' 'customary receiving point'. * * * It is impossible to compute the price ceiling unless it is known whether the purchasers of the poultry were buying for reshipment to another place. It is true that defendants may have knowledge of this fact, but this is immaterial. If the government erroneously computed the ceiling price, defendants should have the opportunity to object to such error without the necessity of standing trial.
>
> "In view of this interpretation of 'buyer's customary receiving point', it is neither necessary nor profitable to discuss each component part of the administrative formula. The facts concerning freight charges are available to defendants, but they are

unable to utilize this information absent an allegation of the 'buyer's customary receiving point.' In short, I cannot tell from the indictments whether a crime has been committed—even if all the facts alleged are proved at trial. This alone renders the indictments insufficient. In passing, even if I were skillful enough to give adequate instructions, I doubt what a jury would make of this business in an attempt to reach an intelligent verdict under the present allegations of the indictments."

There is no need to take such variable factors into account in the case now before the Court.

Conclusion.

From the foregoing it is respectfully submitted by the government that the judgment of the trial court was not contrary to law and that the evidence produced at the trial of the cause was ample to support appellant's conviction upon Count X as charged in the Information.

Respectfully submitted,

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APPENDIX A.

Calculation of Ceiling Price.

The ceiling price of a Grade A beef carcass or side is determined by Maximum Price Regulation 169, as amended by Amendment 15, promulgated June 7, 1943, and made effective as to packers on June 14, 1943, and as to other types of purveyors June 19, 1943. The following quotation is from the Regulation as published in 7 Fed. Reg. 10381, showing the price amendment published in 8 Fed. Reg. 7675.

> "Sec. 1364.452 Schedule I: Beef price zones and applicable zone prices—(a) Zone 1.
>
> (1) Zone 1 includes the following area: Washington, Oregon, California, and Nevada.
>
> (2) Beef carcass and beef wholesale cut prices applicable in Zone 1. Subject to the provisions of paragraph (k) of this section, the Zone 1 price for each grade of each class of beef carcass and beef wholesale cut shall be the price specified therefor in paragraph (d) hereof (the applicable zone (4) price) plus $1.75 per cwt. * * *
>
> "(2) Beef carcass and beef wholesale cut prices applicable in Zone 4.
>
> "Subject to the provisions of paragraph (k) the applicable zone prices for Zone 4 are as follows:
>
> "(All prices are on dollars per hundredweight bases; the price for any fraction of a hundredweight shall be reduced accordingly.)

"Steer or Heifer	Choice or AA	Good or A	Commercial or B	Utility or C	Cutter Canner or D	(Bologna bulls (Equivalent cutter and canner grade
(i) Beef carcass or side	$20.00	19.00	17.00	15.00	12.50	13.00"

"Sec. 1364.454 Schedule III; Amounts which may be added to zone prices listed in Schedule I. Subject to the conditions hereinafter provided, the following may be added to the applicable zone prices: * * *

(2) For transportation from the point at which the meat was slaughtered in Price Zone 1, 2, 5, 6, 7, 8, 9, or 10 to a distribution point located in the same price zone as the slaughter point, other than another slaughter, packing or processing plant owned or controlled by the same seller, the seller may add the actual cost of transportation computed at the lowest common carrier rate for the method of transportation used, but in no event more than 25¢ per cwt.

(3) For local delivery made within a radius of 25 miles from a slaughter plant, packing house, car-route unloading point, railroad unloading station or branch house, to the place of business of a seller at retail, wholesaler (not owned or controlled by the shipper or consignor), hotel supply house (not owned or controlled by the shipper or consignor), or commercial user, or the designated delivery point of a war procurement agency, or other government agency; or

For local delivery made within a radius of 25 miles from the place of business of a wholesaler or hotel supply house, to the place of business of a seller at retail, purveyor of meals, or commercial user, or the designated delivery point of a war procurement agency, or other government agency: the seller may add 25¢ per cwt. * * *

(5) For local delivery made from a slaughter plant, packing house, car-route unloading point, railroad unloading station, or branch house, located in Price Zone 1, 2, 5, 6, 7, 8, 9, or 10, to the place of

business of a seller at retail, wholesaler (not owned or controlled by the shipper or consignor), hotel supply house (not owned or controlled by the shipper or consignor), or commercial user, or the designated delivery point of a war procurement agency, or other government agency, located more than 25 miles from such shipping point; or

For local delivery made from the place of business of a wholesaler or hotel supply house located in Price Zone 1, 2, 5, 6, 7, 8, 9, or 10, to the place of business of a seller at retail, purveyor of meals or commercial user, or the designated delivery point of war procurement agency or other government agency, located more than 25 miles from such shipping point; the seller may add the actual cost of local delivery computed at the lowest common carrier rate for the method of delivery used, but in no event more than 50¢ per cwt.

(6) Notwithstanding any of the provisions of paragraph (a) (1) to (a) (5), inclusive, of this Sec. 1364.454, nothing therein contained shall be construed to permit a total charge for transportation and/or local delivery from the point at which the meat was slaughtered to the place of business or receiving point of a retail seller, purveyor of meals, war procurement agency, other government agency or commercial user of more than 50¢ per cwt. in Price Zone 1, 2, 5, 6, 7, 8, 9, or 10, or 75¢ per cwt. in Price Zone 3 or 4. The transportation and local delivery additions permitted in this paragraph (a) are on a hundredweight basis, and the charge for transportation and/or local delivery for any fraction of a hundredweight shall be reduced accordingly. The additions specified in this paragraph (a) for transportation and/or local delivery may be charged: Provided, That the seller shall itemize separately on

an invoice to the buyer the amount charged the buyer for transportation and/or local delivery, except that if such separate statement of transportation charges is prohibited by local law, the seller shall maintain in his own record of the transaction a separate statement of any addition for transportation or local delivery which is included in the maximum price charged. * * *

(g) Peddler-truck selling addition. On a peddler truck sale involving delivery of not more than 100 pounds of beef in a total delivery of not more than 150 pounds of meats and meat products in any one day from such peddler-truck to any buyer's store door, a peddler may add to the prices specified in Sec. 1364.452 (Schedule I) the sum of $1.25 per cwt. This addition shall be in lieu of any local delivery and/or transportation addition permitted in Sec. 1364.454. * * *"

"Sec. 1364.451:

(k) Applicable zone price of miscuts. For any beef wholesale cut which has been miscut or for any price or portion of beef which has been cut in a manner not authorized by this Revised Maximum Price Regulation No. 169, the zone price used for the determination of the maximum price shall be the applicable zone price of the lowest priced wholesale cut."

Method of Calculation.

Appellant was given the advantage of every additional charge which could be added to the basic price. The ceiling price computed for him was $19.00 per hundredweight, plus $1.75 per hundredweight as the Zone 1 addition, plus $1.25 per hundredweight as the peddler-truck

selling addition, plus 50¢ per hundredweight as a local delivery charge. It is noted that the weight of the beef delivered by appellant was such as to limit him to the 50¢ per hundredweight delivery charge instead of the $1.25 per hundredweight peddler-truck selling addition.

This method of computing the Maximum Price resulted in fixing a higher price at which appellant could sell beef than was permitted under a strict construction of the regulation. In addition to this questionable allowance there was the additional concession of allowing him the 50¢ maximum per hundredweight for local delivery. Obviously he was entitled, not to both the local delivery addition and the peddler-truck selling addition, but to the one of the two which fitted the circumstances of his delivery. Hence it appears that there was an error favorable to appellant in computing his maximum price at 22¼¢ per pound, and his true maximum price was 1¼¢ per pound less. However, this was an error in appellant's favor.

It is a familiar rule that a defendant cannot complain of error made in his favor, moreover, he has not complained of it.

The case was tried on the theory that the price pleaded in the Information as the maximum price was in fact the maximum. Appellant so testified and has not at the trial nor in his brief disputed that price. [R. p. 201.]

APPENDIX B.

PERTINENT PORTIONS OF THE STATUTE AND REGULATION.

Emergency Price Control Act of 1942, Pub. L. 421, 77th Cong., 2d Sess., 56 Stat. 23, January 30, 1942:

> "Sec. 4. (a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202(b) or section 205(f), or to offer, solicit, attempt, or agree to do any of the foregoing."

Revised Maximum Price Regulation No. 169 (7 Fed. Reg. 10381):

> "Sec. 1364.401. *Prohibition against selling beef and veal carcasses and wholesale cuts, and processed products at prices above the maximum—(a) Beef carcasses and wholesale cuts.* On and after December 16, 1942, regardless of any contract, agreement, or other obligation no person shall sell or deliver any beef carcass or beef wholesale cut, and no person shall buy or receive any beef carcass or beef wholesale cut at a price higher than the maximum price permitted by Sec. 1364.451; and no person shall agree, offer, solicit or attempt to do any of the foregoing. The provisions of this Revised Maximum Price Regulation No. 169 shall not be applicable to

sales or deliveries of beef carcasses or beef wholesale cuts to a purchaser, if, prior to December 10, 1942, such beef carcasses or beef wholesale cuts have been received by a carrier other than a carrier owned or controlled by the seller, for shipment to such purchaser. 'Person,' 'beef carcass,' and 'beef wholesale cut' are defined in Sec. 1364.455.

"Sec. 1364.454 Schedule III; Amounts which may be added to zone prices listed in Schedule I. Subject to the conditions hereinafter provided, the following may be added to the applicable zone price:
* * *

(2) For transportation from the point at which the meat was slaughtered in Price Zone 1, 2, 5, 6, 7, 8, 9, or 10 to a distribution point located in the same price zone as the slaughter point, other than another slaughter, packing or processing plant owned or controlled by the same seller, the seller may add the actual cost of transportation computed at the lowest common carrier rate for the method of transportation used, but in no event more than 25¢ per cwt.

(3) For local delivery made within a radius of 25 miles from a slaughter plant, packing house, carroute unloading point, railroad unloading station or branch house, to the place of business of a seller at retail, wholesaler (not owned or controlled by the shipper or consignor), hotel supply house (not owned or controlled by the shipper or consignor), or commercial user, or the designated delivery point of a war procurement agency, or other government agency; or

For local delivery made within a radius of 25 miles from the place of business of a wholesaler or hotel supply house, to the place of business of a seller at retail, purveyor of meals, or commercial user, or the

designated delivery point of a war procurement agency, or other government agency; the seller may add 25¢ per cwt. * * *

(5) For local delivery made from a slaughter plant, packing house, car-route unloading point, railroad unloading station, or branch house, located in Price Zone 1, 2, 5, 6, 7, 8, 9, or 10, to the place of business of a seller at retail, wholesaler (not owned or controlled by the shipper or consignor), hotel supply house (not owned or controlled by the shipper or consignor), or commercial user, or the designated delivery point of a war procurement agency, or other government agency, located more than 25 miles from such shipping point; or

For local delivery made from the place of business of a wholesaler or hotel supply house located in Price Zone 1, 2, 5, 6, 7, 8, 9, or 10, to the place of business of a seller at retail, purveyor of meals or commercial user, or the designated delivery point of a war procurement agency or other government agency, located more than 25 miles from such shipping point; the seller may add the actual cost of local delivery computed at the lowest common carrier rate for the method of delivery used, but in no event more than 50¢ per cwt.

(6) Notwithstanding any of the provisions of paragraph (a) (1) to (a) (5), inclusive, of this Sec. 1364.454, nothing therein contained shall be construed to permit a total charge for transportation and/or local delivery from the point at which the meat was slaughtered to the place of business or receiving point of a retail seller, purveyor of meals, war procurement agency, other government agency or commercial user of more than 50¢ per cwt. in Price Zone 1, 2, 5, 6, 7, 8, 9, or 10, or 75¢ per cwt.

in Price Zone 3 or 4. The transportation and local delivery additions permitted in this paragraph (a) are on a hundredweight basis, and the charge for transportation and/or local delivery for any fraction of a hundredweight shall be reduced accordingly. The additions specified in this paragraph (a) for transportation and/or local delivery may be charged: Provided, That the seller shall itemize separately on an invoice to the buyer the amount charged the buyer for transportation and/or local delivery, except that if such separate statement of transportation charges is prohibited by local law, the seller shall maintain in his own record of the transaction a separate statement of any addition for transportation or local delivery which is included in the maximum price charged. * * *

(g) Peddler-truck selling addition. On a peddler truck sale involving delivery of not more than 100 pounds of beef in a total delivery of not more than 150 pounds of meats and meat products in any one day from such peddler-truck to any buyer's store door, a peddler may add to the prices specified in Sec. 1364.452 (Schedule I) the sum of $1.25 per cwt. This addition shall be in lieu of any local delivery and/or transportation addition permitted in Sec. 1364.454. * * *"

"Sec. 1364.451:

(k) Applicable zone price of miscuts. For any beef wholesale cut which has been miscut or for any price or portion of beef which has been cut in a manner not authorized by this Revised Maximum Price Regulation No. 169, the zone price used for the determination of the maximum price shall be the applicable zone price of the lowest priced wholesale cut."

Amendment 15 to the Revised Maximum Price Regulation No. 169 (8 Fed. Reg. 7675):

"2. Section 1364.452 (d) (2) is amended by changing the table of prices to read as follows:

(All prices are on dollars per hundredweight basis; the price for any fraction of a hundredweight shall be reduced accordingly.)

"Steer or Heifer	Choice or AA	Good or A	Commercial or B	Utility or C	Cutter Canner or D	(Bologna bulls (Equivalent cutter and canner grade
(i) Beef carcass or side	$20.00	19.00	17.00	15.00	12.50	13.00"